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2011

# Stacie Powell v. Utah Department of Commerce : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STACIE POWELL,

Petitioner/Appellant,

v.

UTAH DEPARTMENT OF  
COMMERCE,

Respondent/Appellee.

Appellate No. 20110195

Agency No. DOPL-OSC-2-2007-51

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AMENDED REPLY BRIEF OF APPELLANT

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ON APPEAL FROM DECISION OF THE UTAH DEPARTMENT OF COMMERCE

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**Appellant requests oral argument and a published decision.**

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## ARGUMENT

### **I. The Decision to Revoke Ms. Powell's Nursing License Was Based on an Unsupported Assumption That She Has a Substance Abuse Problem and Thus, Must be Reversed.**

The Division's decision to revoke Ms. Powell's nursing license is not supported by substantial evidence. This is a unique situation in which there is not a specific finding of fact that is unsupported, but rather it is the inferences and conclusions drawn by the Division from the facts that is unsupported. As thoroughly explained in Ms. Powell's Appellant Brief, the Division has used the absence of drug testing results to improperly conclude that Ms. Powell has a substance abuse problem and therefore, is a threat to public safety. The Division has absolutely no affirmative evidence that Ms. Powell is a drug abuser. In fact, the evidence before the Division suggests Ms. Powell does not use drugs. There are no positive drug test results in evidence. Both Ms. Call (Compliance Specialist for the Board of Nursing) and Ms. Poe (Division Bureau Manager) admitted that the Division has no evidence of unauthorized drug use by Ms. Powell, and that no accusations have been made against Ms. Powell for improper use of controlled substances. (*See* Hearing Transcript at pp. 23, 43, 44 & 54, starting at R. 161.) Ms. Powell's Self-Assessment Reports are void of any evidence suggesting drug relapse and/or consumption of medications not lawfully prescribed to her. (*See* R. 175, 178, 181, 184, 187, 189, 192, 195 and 198.) Ms. Powell's Employer Reports are void of any information suggesting that substance-abuse related behaviors interfered with her employment and in fact, describe her as an excellent nurse. (*See* R. 176, 179, 182, 185, 188, 190, 193 and 199.) In the Employer Report dated September 8, 2009, Ms. Powell's

supervisor reported that random urine samples had been obtained from Ms. Powell and that there was no evidence of drug consumption. (*See* R. 199.) While under the 2007 and 2008 Stipulations, Ms. Powell obtained and maintained employment as a nurse. Ms. Powell would not have been hired, nor would have she been able to perform to the level described in the monthly reports, had she been using drugs. The above-described evidence has been entirely disregarded. The Division jumped to the conclusion that if Ms. Powell had participated in the drug testing program, her results would have been positive for drug use. This assumption is unjustified, unfair and not supported by substantial evidence; in fact, it is not supported by *any* evidence.

In attempts to further its argument, the Division has referenced disciplinary action taken against Ms. Powell by the Arizona Board of Nursing in 2005 and 2006. Such disciplinary action has no relevance to the matters at issue on appeal. The hearing which ultimately resulted in the revocation of Ms. Powell's nursing license involved allegations of failure to comply with the 2008 Utah Stipulation. Any reference or consideration of the Arizona matter would be improper as that was not an issue in determination before the Board. Moreover, Ms. Powell disputes the accuracy and appropriateness of the actions taken by the Arizona Board of Nursing. Accordingly, such information should be disregarded entirely.

The Division has attempted to argue that the decision to revoke Ms. Powell's license was not based on an assumption of a drug abuse problem, but rather based on the violation of multiple provisions of the 2008 Stipulation. Specifically, the Division claims Ms. Powell violated the five following stipulation provisions:

(1) failing to meet with the Division on May 28, 2008; (2) failing to provide a copy of a prescription for hydrocodone to the Division; (3) failing to provide reports and documentation to the Division on the first day of the month for the months of May, June and July 2009; (4) failing to notify the Board in writing within one week of any change in employer, employment or practice status; and (5) failing to sign up with Compass Vision for drug testing.

(See Appellant's Brief at p. 8.) Despite claims to the contrary, Ms. Powell has and will again play the role of devil's advocate and marshal all evidence relating to the Division's allegations against her. Testimony given during the January 14, 2010 hearing disproves the Division's argument. Ms. Powell thoroughly explained and/or disproved any wrongdoing concerning four of the five alleged violations. The only alleged violation that Ms. Powell was unable to explain to the Division's satisfaction was the failure to enroll in a drug screening program.

First, the Division alleged that Ms. Powell failed to attend a meeting with the Division on May 28, 2008. Ms. Call first testified that Ms. Powell did not give any advanced notice for her absence. (See Hearing Transcript at p. 10, starting at R. 161.) However, Ms. Call subsequently explained that she did have a conversation with Ms. Powell on May 27, 2008 and that Ms. Powell explained that she would not be able to attend the scheduled meeting because she was in Arizona helping her daughter who had gone into premature labor and delivered a sick infant. (See Hearing Transcript at p. 18, 19, 66 & 67, starting at R. 161.) The Division claims it was Ms. Powell's responsibility to let them know when she returned to Utah so their meeting could be rescheduled. (See Hearing Transcript at p. 18 & 19, starting at R. 161.) It was Ms. Powell's understanding



that the Division would advise her when the Board planned to meet again and that her appointment to appear before the Board would be rescheduled. (*See* Hearing Transcript at p. 66 & 67, starting at R. 161.) Between April 2009 and October 2009, the Division never contacted Ms. Powell or Ms. Powell's attorney to reschedule the meeting. (*See* Hearing Transcript at p. 19 & 20, starting at R. 161.) When Ms. Powell was instructed to meet with the Board in January 2009, she complied. (*See* Hearing Transcript at p. 66 & 67, starting at R. 161.)

Second, the Division alleged Ms. Powell failed to provide a copy of a hydrocodone prescription. (*See* Hearing Transcript at p. 10 & 11, starting at R. 161.) Ms. Powell explained that she was extremely ill in April 2009 when she was given a prescription for a cough medicine that contained hydrocodone. (*See* Hearing Transcript at p. 68, starting at R. 161.) Ms. Powell believes she sent in a copy of the prescription as required and does not know why it was not received by the Division. (*See* Hearing Transcript at p. 68, starting at R. 161.) There have not been any other controlled substance prescriptions for which Ms. Powell did not notify the Division. (*See* Hearing Transcript at p. 68, starting at R. 161.)

Third, the Division alleged that Ms. Powell failed to submit monthly reports in May, June and July 2009 as required by the 2008 Stipulation. (*See* Hearing Transcript at p. 12, starting at R. 161.) This allegation was based on Ms. Call's position that the reports were due on the first day of each month. (*See* Hearing Transcript at p. 12 & 13, starting at R. 161.) However, Ms. Call later admitted that the language of the 2008 Stipulation did not state the reports had to be submitted by the first of the month. (*See*

Hearing Transcript at p. 25 & 26, starting at R. 161.) Ms. Call admitted that the Division did in fact receive Ms. Powell's monthly assessment reports for May, June and July 2009.

(See Hearing Transcript at p. 24, starting at R. 161.) Moreover, Judge Eklund stated:

The Board initially finds and concludes *there is a lack of sufficient evidence [Ms. Powell] failed to timely submit monthly reports to the Division between May 2009 through July 2009. Specifically, [Ms. Powell] provided the required reports to the Division during those months . . . .* Since the Board finds and concludes the reports were submitted at some point during each month, no proper basis exists to find [Ms. Powell] violated the governing Order in that regard.

(R. 153) (emphasis added.)

Fourth, the Division alleged that Ms. Powell did not appropriately submit employer reports (i.e. within one week of any change in employment practice). (See Hearing Transcript at p. 16 & 17, starting at R. 161.) Specifically, it is the Division's position that Ms. Powell ended employment with one employer on August 10, 2009, but did not notify the Board until September 1, 2009, and that several weeks passed before Ms. Powell advised them of new employment with Life Care in October 2009. (See Hearing Transcript at p. 17, starting at R. 161.) Nonetheless, Ms. Call admitted that during the times Ms. Powell was working, Ms. Powell submitted employer reports. (See Hearing Transcript at p. 26, starting at R. 161.) When Ms. Powell was not working, she accurately documented her status on a self-assessment report. (See Hearing Transcript at p. 26, starting at R. 161.) On September 1, 2009, the Division received an employer report from Ms. Powell indicating she was not working and on October 5, 2009, the Division received a report explaining that Ms. Powell has started a new job. (See

Hearing Transcript at p. 26 & 27, starting at R. 161.) Ms. Call testified that the Division had been notified and was aware of all the employment Ms. Powell held between December 1, 2008 and September 30, 2009. (See Hearing Transcript at p. 29, starting at R. 161.)

Lastly, the Division alleged that Ms. Powell failed to enroll and participate in the Compass Vision drug screening program. (See Hearing Transcript at p. 11 & 12, starting at R. 161.) A large portion of the January hearing was spent discussing the reasons Ms. Powell did not register for Compass Vision. Ms. Powell testified about her concerns relating to the integrity of Compass Vision's chain-of-custody procedures. It was Ms. Powell's fear that the chain-of-custody problems at Compass Vision would cause her to receive a false positive result. Such issues go to Ms. Powell's mindset and reasoning for not enrolling. (See Hearing Transcript at p. 42 & 43, starting at R. 161; and R. 148-151.) Ms. Powell raised these concerns with Ms. Poe. Ms. Poe admitted that she was aware, prior to Ms. Powell entering the December 2008 Stipulation, of chain-of-custody problems with Compass Vision testing procedures. (See Hearing Transcript at p. 51 & 52, starting at R. 161; and R. 151.) While Ms. Powell was willing to participate in a drug testing program other than Compass Vision, Ms. Poe would not allow that. (See Hearing Transcript at p. 46 & 47, starting at R. 161.) The Division had a contract with Compass Vision. Thus, even though there were chain-of-custody concerns with Compass Vision, testing with a different company was not allowed. (See Hearing Transcript at p. 46 & 47, starting at R. 161.)

The Division's decision to revoke Ms. Powell's nursing license was premised on Ms. Powell's failure to enroll in drug testing, and assumptions made by the Division because of that failure. Ms. Poe testified that she "*could wink an eye* at most everything *but the drug screening*" and that the absence of drug testing was "the issue that's absolutely most severe." (See Hearing Transcript at p. 50 & 51, starting at R. 161) (emphasis added.) In the May 2010 Order, Judge Eklund stated that if Ms. Powell's alleged violations had not included a failure to participate in a drug screening program, "it may be warranted to only extend [her] probationary status under that Order or possibly suspend her nursing license for a brief time." (R. 138.) The evidence clearly shows that the Division's decision to revoke Ms. Powell's license was not based on multiple violations of the 2008 Stipulation. The only alleged violation that Ms. Powell could not explain to the Division's satisfaction was the allegation concerning drug testing. But for that issue, the Division would not have entered the punitive punishment of revocation.

During the January 2010 hearing, various members of the Nursing Board repeatedly stated that the Board's purpose and focus is to maintain public safety. (See Hearing Transcript at p. 93 & 103, starting at R. 161.) However, simply failing to register for the Compass Vision program does not establish that Ms. Powell is a risk to public safety. The Division cannot conclude that Ms. Powell is a danger to public safety unless they assume she has a substance abuse problem. In February 2011, the Division's Executive Director Francine Giani stated that the failure to provide a sample for drug analysis was equivalent to a positive test result. (R. 10.) This assumption was reiterated by the Division in its Appellee's Brief. (See Appellee's Brief at p. 5 & 13.) The Division

improperly assumed that all of Ms. Powell's drug tests would have been positive, and used that assumption to permanently revoke her nursing license.

There is no evidence in this case to support the Division's conclusion that Ms. Powell has a substance abuse problem and/or is a threat to public safety. In fact, there is evidence that directly contradicts that conclusion. The Order revoking Ms. Powell's license is permanent. It forever deprives Ms. Powell of the ability to perform gainful employment as a nurse. The revocation has also deprived Ms. Powell of the ability to secure employment outside of the nursing profession. On several occasions since the revocation was implemented, Ms. Powell has been declined job placement because of the disciplinary status of her nursing license. Hence, Ms. Powell has been, and will forever continue to be, substantially prejudiced as a result of the Division's actions.

The Division has cited to *Ashcroft v. Industrial Comm. of Utah*, 855 P.2d 267 (Utah 1993), in attempts to argue that Ms. Powell has not properly preserved issues for appeal. The *Ashcroft* decision is distinguishable on this issue and thus, fails to further the Division's argument. In *Ashcroft*, Dennis Ashcroft claimed that an industrial injury rendered him unable to work and thus, he petitioned for additional temporary disability benefits. At a formal hearing, the ALJ refused to convene a medical panel and denied Mr. Ashcroft's request for benefits. Ashcroft moved the Industrial Commission for review on the basis that the ALJ had refused to convene a medical panel. The Commission affirmed the denial of benefits and Ashcroft sought a judicial review. Ashcroft's arguments on judicial review did not concern the failure to convene a medical panel, but rather were sufficiency of evidence, standard of proof and adequacy of

findings. The Court concluded that Ashcroft had “waived the issues of sufficiency of evidence and adequacy of the ALJ’s findings” because he “failed to raise the . . . issues before the Commission.” *Id.* at 268-69. Unlike in Ashcroft, Ms. Powell’s arguments on judicial review are the exact same arguments she raised before the administrative agency. A lack of supporting evidence has been Ms. Powell’s argument through the entire appeals process. (R. 17-23, 55-66 and 117-123.) As such, Ms. Powell has in fact properly preserved her arguments for judicial review.

Ms. Powell has also challenged the sufficiency of the ALJ’s findings. As discussed above, Ms. Powell is challenging the inferences and assumptions drawn from the facts in this case including the inferences and assumptions made by the ALJ. The recommendation given by the ALJ to revoke Ms. Powell’s nursing license was based on an improper assumption that Ms. Powell has a substance abuse problem.

In filing this appeal, Ms. Powell is not seeking immediate reinstatement of her nursing license. Ms. Powell is simply asking that the parties take a step back and objectively look at the situation. Rather than permanent revocation, it would be much more reasonable for Ms. Powell’s license to be placed in a probationary status until she has proven her drug-free status with a reliable drug testing program. Permanent revocation is an excessive punishment for which there is no supporting evidence. For these reasons, the Division’s decision to revoke Ms. Powell’s nursing license must be reversed.

## **II. The Decision to Revoke Ms. Powell's Nursing License is Arbitrary and Capricious and Thus, Must be Reversed.**

For the reasons stated above, an assumption of drug abuse did in fact serve as the basis for revocation of Ms. Powell's nursing license. That improper and unwarranted assumption also supports a finding that the revocation was arbitrary and capricious. The unreasonable nature of the Division's decision is evidenced by the following: (1) the decision is inconsistent with prior disciplinary practices; and (2) the decision is being imposed based on an inaccurate claim that Ms. Powell is not sorry enough or has not exhibited sufficient remorse.

First, the arbitrary and capricious nature of the Division's revocation is evidenced by its inconsistency with punishments handed down to other healthcare providers in similar circumstances. Ms. Powell has preserved this issue for appeal. In the briefs submitted at the agency level, Ms. Powell repeatedly and consistently argued that the agency's decision to revoke her license was arbitrary and capricious. (R. 61-64 and 119-121.) Inconsistency of disciplinary actions is but one of the issues that goes to the arbitrary and capricious nature of the Division's decision. Whether Ms. Powell's punishment was consistent with disciplinary actions taken against other licensees was raised for the first time *by the Division* at the January 2010 hearing. During the final reply to closing argument, counsel for the Division stated that no second chance would be given to Ms. Powell because her situation was different from other discipline cases.

I really think that in this case there is just no opportunity for a second chance. I've seen cases where we've done it, but it's because they've really come in and made a contrite admission and they're willing to own it and take personal

responsibility for their failures. I don't see that here with Ms. Powell.

(Hearing Transcript at p. 120 & 121, starting at R. 161)(emphasis added.) The Division did not raise this issue in any of its briefings and did not bring it up prior to closing arguments.

Second, the revocation of Ms. Powell's nursing license is arbitrary and capricious because it was imposed as means of punishing Ms. Powell for not expressing the amount of remorse expected by the Division. (See Hearing Transcript at p. 103, 104 & 121, starting at R. 161.) In her Appellant's Brief, Ms. Powell clearly and accurately cited hearing testimony in which she explained that she never meant not to violate the stipulation terms and that her noncompliance was not purposeful. (See Appellant Brief at p. 14 & 15 and Hearing Transcript at p. 76, 102 & 103, starting at R. 161.) Ms. Powell's failure to enroll in drug testing is not an issue of credibility. Ms. Powell was concerned about the reliability of testing procedure and the problems a false positive result would create. Ms. Powell did not believe that the Division and/or Ms. Poe were taking her concerns seriously. It was Ms. Powell's perception that the Division was sending her to Compass Vision to fail.

The Division has unreasonably chosen permanent license revocation as the means of teaching Ms. Powell a lesson. "And I wished you would have *learned your lesson sooner*. We wouldn't be here today." (Hearing Transcript at p. 102, starting at R. 161) (emphasis added.) Arbitrarily imposing permanent license revocation versus probation or some other less severe punishment as a means of teaching Ms. Powell a lesson is entirely



unreasonable. The “lesson” the Board believes it needs to impose is no longer necessary. Ms. Powell has recognized her noncompliance with the stipulation. (Hearing Transcript at pp. 76 & 103, starting at R. 161.) She has also expressed remorse for her decisions and admitted to learning from her actions. (Hearing Transcript at p. 103, starting at R. 161.) Ms. Powell’s situation can more appropriately be handled with measures short of license revocation. Ms. Powell has never been shown to be a threat to public safety. In fact, her employer reports have been good. Besides herself, Ms. Powell has never hurt anyone. The Division’s decision to permanently revoke Ms. Powell’s nursing license as a means of making sure she is sorry for what she has done, and/or “teaching her a lesson” is arbitrary, capricious and completely unreasonable. The Division’s decision must be reversed.

### CONCLUSION

Ms. Powell respectfully requests that the Division’s decision revoking her nursing license be reversed.

DATED this 19<sup>th</sup> day of September, 2011.

STRONG & HANNI

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**CERTIFICATE OF MAILING**

I hereby certify that on this 19<sup>th</sup> day of September, 2011, two true and correct copies of the foregoing AMENDED REPLY BRIEF OF APPELLANT were served via U.S. mail, postage prepaid, to the following:

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